SUPREME COURT, U. S.
(38876)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 651

IRVING A. GLADSTONE, HERMINE J. NELSON and MICHAEL J. ROMANO, individually, and as President of New York City Elementary School Principals Association on behalf of its members,

Petitioners,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Preliminary Statement

The petitioners seek to have this Court review by writ of certiorari an order of the Court of Appeals of the State of New York, entered on June 1, 1967, which unanimously affirmed without opinion the dismissal of petitioners' complaint, without prejudice to any new suit which petitioners might be advised to institute in the event of altered circumstances.

Question Presented

The Board of Education of the City of New York has initiated an experimental program replacing a number of junior high schools (grades 7-9) with intermediate schools (grades 5-8), and has reassigned the principals of the junior high schools as principals of the intermediate schools. Junior high school principals are paid $1,000 more in salary per year than the principals of the present elementary schools (grades 1-6 or grades 1-8). The question presented is whether the Board of Education discriminated against the principals of elementary schools by paying the intermediate school principals the same rate of pay as they had been receiving as junior high school principals, in violation of the equal protection clause of the Constitution.

Facts

Prior to September 1965, the New York City schools were organized either under the traditional 8-4 system or under the newer 6-3-3 system (R. 6, 57). Under the 8-4 system, elementary schools gave instruction in grades 1 through 8 and kindergarten, and academic and vocational high schools gave instruction in grades 9 through 12 (R. 6, 16-17). Under the 6-3-3 system, elementary schools gave instruction in grades 1 through 6 and kindergarten; junior high schools gave instruction in grades 7 through 9; and academic and vocational high schools gave instruction in grades 10 through 12 (R. 6, 16-17).

On or about April 28, 1965, the defendant, the Board of Education of the City of New York, adopted a resolution which called for a reorganization of the New York City School System (R. 56). It proposed that the 8-4 and 6-3-3 systems be changed initially to a 5-3-4 system and then eventually to a 4-4-4 system (R. 20-22, 56-57). Under the proposed change, "primary" schools would give instruc-

tion in kindergarten and in grades 1 through 4 or 5; "intermediate" schools, replacing junior high schools, would begin instruction in grades 5 or 6 and continue through grade 8; and high schools would give instruction in grades 9 through 12.

On May 27, 1965, as a result of a request by defendant and of similar requests by other school districts, the New York State Board of Regents amended Article XV, Section 117, of the Regulations of the State Commissioner of Education (R. 57). The amendment permitted any school district, upon approval of its Board of Education and the Commissioner of Education, to experiment for a five-year period with organizational changes that altered the definition of an elementary, junior and senior high school; and to employ certified or licensed teachers for any teaching assignment within the scope of the experiment for which the teachers were deemed qualified by education and experience (R. 57).

On June 14, 1965, defendant adopted a resolution affirming its approval of the reorganization plan and suspending any of its bylaws which were inconsistent with the new program (R. 58, 61-62). On July 12, 1965, the Commissioner of Education approved the proposed plan for a two year period beginning on July 1, 1965 (R. 58-63).

Beginning with the September 1965 school year, approximately thirty-nine junior high schools in New York City were converted to intermediate schools under the experimental program (R. 58). Licensed junior high school principals were assigned as principals of the new intermediate schools and were paid in accordance with the salary scale of junior high school principals (R. 22-23, 59). The salaries of junior high school principals are $1,000 more in amount per year than the salaries of elementary school principals (R. 22).

Petitioners in this action are principals of elementary schools which give instruction from kindergarten through

grade 6 or through grade 8 (R. 16). They are paid in accordance with the salary scale of elementary school principals (R. 22).

Petitioners in this proceeding allege that the intermediate schools are, in fact, elementary schools by definition and in actual practice, and that, consequently, the fixation of higher salaries for intermediate school principals than for elementary school principals constitutes an arbitrary and unreasonable discrimination against the plaintiffs in violation of the equal protection and due process clauses of the Constitution. They, therefore, seek to have their salaries, as elementary school principals, fixed at the same amount as is provided for intermediate school principals.

In an answering affidavit, Dr. Bernard E. Donovan, the defendant's Superintendent of Schools, stated in pertinent part (R. 59):

> "16—It must also be pointed out that the 'Intermediate' schools which plaintiffs are complaining about, while not falling within the old definition of a junior high school, nevertheless are being operated in the same manner as were the old junior high schools. There are special syllabi being used for grades 6, 7 and 8, students are being instructed on a departmental basis, students are receiving instruction given by subject specialists, they are receiving shop training, all of which were present in the original junior high schools, but never present in an elementary school.
>
> "17—In addition junior high school teachers are licensed specially in specific subjects after having taken examinations specifically geared to test their proficiency in the subject specialty, whereas elementary school teachers are tested in common branches only. As a result thereof junior high school principals are those who have been tested as to their ability to supervise teachers who are licensed in special subjects as well as his ability to administer a school on the basis

of subject specialty, departmental instruction, shop courses, as outlined in paragraph '16', supra."

The Supreme Court, Kings County, dismissed the complaint, holding that the intermediate schools were not elementary schools by definition, and that the duties and functions contemplated for principals of intermediate schools were quite different from those presently subsisting for principals of elementary schools. The Appellate Division, Second Department, and the Court of Appeals of New York State unanimously affirmed.

ARGUMENT

Intermediate schools are not the same as elementary schools either by definition or in actual practice. Consequently, the fixation of higher salaries for intermediate school principals than for elementary school principals did not offend the equal protection or due process clauses of the Constitution.

(1)

There can be no serious question that the intermediate school is authorized under New York law and that the intermediate schools are not elementary schools by definition. The Board of Regents, which is empowered under Section 207 of the Education Law to exercise legislative functions concerning the educational system of New York State, amended the regulations of the Commissioner of Education to authorize the defendant to experiment with organizational changes that altered the definition of an elementary, junior and senior high school. (See text of amendment, Petition, pp. 3-4.) Defendant itself suspended all of its bylaws which were inconsistent with the proposed plan.

Section 2(7) of the Education Law does not represent a legislative policy which would prohibit the present reor-

ganization of the school system, as petitioners argue (Petition, p. 22). That section merely states that the term "secondary education", as used in the Education Law, means "instruction of academic grade, between the elementary grades and the college or university". It does not define elementary schools, merely referring to the elementary grades as preceding secondary education. Undoubtedly the elementary grades referred to are grades 1 through 8. This does not mean that there cannot be different types of schools for the elementary grades, that there cannot be different types of teaching in a separate school for the higher elementary grades, or that higher salaries cannot be paid to principals qualified to supervise the different type of teaching in the schools for such higher grades.

(2)

A classification established by law will not be set aside if any state of facts may reasonably be conceived to justify it. *McGowan* v. *Maryland,* 366 U. S. 420, 426 (1961). One who assails a classification has the burden of showing that it does not rest on any reasonable basis, but is essentially arbitrary. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78-79 (1911). Salary distinctions may be made even for identical positions if the distinctions are based on proper objectives. *Kavanagh* v. *Brown,* 206 Fed. Supp. 479 (D. Mich., 1962), aff'd 371 U. S. 35 (1962).

It is clear that the intermediate schools are different from the elementary schools in actual practice and that, consequently, the salary differentiation here in question does not offend the equal protection or due process clauses of the Constitution.

The differences between the intermediate school and the elementary school are essentially those which distinguish the junior high school from the elementary school. Instead of one teacher teaching a class all or most of the time, the intermediate school, like the junior high school, is

operated on a departmental basis with instruction given by subject specialists (R. 59). In addition, the intermediate school students, unlike elementary school students but like those in junior high schools, are given shop training (R. 59).

As noted in *Matter of Brady* v. *Board of Education*, 136 Misc. 1, 6, 239 N. Y. Supp. 642, 648 (Sup. Ct., N. Y. Co., 1930), aff'd 229 App. Div. 853, 243 N. Y. Supp. 806 (1st Dept., 1930), the most common feature of the junior high school is the departmental method, which is defined as " 'the assignment of subjects to teachers so as to permit at least some measure of specialization, in contrast with the unspecialized teaching formerly universal in upper grammar schools.' " Under the new intermediate school program, the emphasis on specialization will begin in the fifth and sixth grades in intermediate schools instead of in the seventh grade in junior high school.

Because junior high school principals have been tested as to their ability to supervise teachers who are licensed in specific subjects and as to their ability to administer a school on the basis of subject specialty and departmental instruction, they, and not elementary school principals, have been reassigned as principals of the intermediate schools (R. 59). Whereas junior high school teachers take examinations which are specifically geared to test their proficiency in a subject speciality, elementary school teachers are licensed in common branches only (R. 59).

Petitioners assert that the same specialization exists in the sixth, seventh and eighth grades of both the elementary and intermediate schools (Petition, p. 19). There is only limited support for this contention in the record. For the most part there are only statements concerning limited specialization in these elementary schools classes. (See Petition, pp. 17-19.) Even assuming that the specialization and departmentalization in the sixth, seventh and eighth grades were identical with that of the intermediate

schools, there would still be a substantial difference between the duties of an elementary school principal and those of an intermediate school principal.

The elementary schools are comprised of many grades, namely, kindergarten and grades 1 through 5, which are not devoted to specialized treatment of subject matter. Furthermore, of the approximately 600 elementary schools in New York City, apparently only 31 extend through the seventh and eighth grades. Thus, the specialization that exists in the bulk of the elementary schools is negligible when compared with the specialization that exists in the intermediate schools.

Moreover, intermediate school principals are being paid the salary to which their junior high school principal's licenses entitle them, while petitioners are being paid the salary to which their elementary school principal's licenses entitle them. Under New York law, the license held, not the work performed, determines the salary to be paid. See *Thomas* v. *Board of Education,* 201 N. Y. 457, 94 N. E. 1082 (1911); *Hazen* v. *Board of Education,* 127 App. Div. 235, 111 N. Y. Supp. 337 (2d Dept., 1908); *Hoefling* v. *Board of Education,* 120 App. Div. 545, 104 N. Y. Supp. 941 (2d Dept., 1907); *Bacon* v. *Board of Education,* 205 Misc. 73, 122 N.Y.S. 2d 98 (Sup. St., N. Y. Co., 1953), aff'd 285 App. Div. 1046, 141 N.Y.S. 2d 508 (1st Dept., 1953), lv. den. 309 N. Y. 1030 (1955).

The New York Court of Appeals has upheld the legality of pay schedules granting higher salaries to junior high school principals than to elementary school principals and granting higher salaries to senior high school principals than to junior high school principals. *Matter of Lapolla* v. *Board of Education,* 195 Misc. 651, 90 N.Y.S. 2d 424 (Sup. Ct., N. Y. Co., 1949), aff'd 275 App. Div. 1038, 92 N.Y.S. 2d 419 (1st Dept., 1949), aff'd 301 N. Y. 580, N. E. 2d 490 (1950); *Matter of Burns* v. *Board of Education,* 301 N. Y. 584, 93 N. E. 2d 491 (1950). Since intermediate

schools are being operated in the same manner as the junior high schools, the payment of higher salaries to intermediate school principals than to elementary school principals cannot be said to be an arbitrary discrimination.

The distinction between intermediate school principals and elementary school principals is more than sufficient to meet the constitutional requirements for equal protection of the law. See *Railway Express Agency* v. *New York*, 336 U. S. 106, 109-110 (1949); *Snowden* v. *Hughes*, 321 U. S. 1, 8-9 (1944); *Phelps* v. *Board of Education*, 300 U. S. 319, 323-324 (1937); *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 418 (1914).

CONCLUSION

The petition for a writ or certiorari should be denied.

October 20, 1967.

Respectfully submitted,

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